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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

October 21, 2014

The Committee on Legal Services met on Tuesday, October 21, 2014, at 10:01 a.m. in HCR 0112. The following members were present:

Senator Steadman, Vice-chair
Senator Brophy
Senator Guzman
Senator Johnston
Senator Roberts
Representative Foote
Representative Kagan
Representative McCann
Representative Scott (present at 10:17 a.m.)
Representative Waller

Senator Steadman called the meeting to order. He welcomed Representative McCann as a new member of the Committee and welcomed Representative Waller who was temporarily appointed to the Committee to replace Representative Gardner for today's meeting.

10:02 a.m. – Senator Steadman addressed agenda item 1 – Discussion of Chair vacancy.

Senator Steadman said Representative Labuda had been the Chair of the Committee since last November when Senator Morse was recalled from office. Representative Labuda served out the rest of the 2013 calendar year as the Acting

Chair and then was elected Chair for the 2014 calendar year. Then, at the conclusion of this year's session, the Speaker of the House removed her as a member of the Committee and we now have Representative McCann as her replacement. Since the removal of Representative Labuda from the Committee, I, as the Vice-chair, have been Acting Chair all summer. We are scheduled to have this meeting today and one more in December before the membership of the Committee changes. If the Committee wishes, we could conduct an election to fill the chairmanship. It is technically the House's turn to chair the Committee at least for the remainder of the year. I'm more than willing to continue serving as the Acting Chair, but I will leave it up to the Committee's pleasure as to whether or not we should install a House member as the Chair of the Committee.

10:03 a.m.

Senator Roberts moved that Senator Steadman continue as Acting Chair for this year. Senator Steadman said I don't know that we need a motion for that. We can just move on to the next agenda item if Senator Roberts withdraws the motion. Senator Roberts withdrew her motion.

10:04 a.m. – Michael Dohr, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 2a - Rules of the State Parole Board, Department of Corrections, concerning the state board of parole and parole procedures, 8 CCR 1511-1 (LLS Docket No. 140029, SOS Tracking No. 2013-01039).

Mr. Dohr said today I'm presenting a rule from the state board of parole regarding file reviews. Pursuant to section 17-2-201 (4) (f), C.R.S., the General Assembly has authorized two circumstances in which the parole board can conduct a hearing without the presence of an inmate, commonly referred to as a file review. The first instance is when the inmate is applying for special needs parole and the inmate's case does not require victim notification. The second instance is when the United States immigration and customs enforcement agency has filed a detainer against the inmate, the inmate is presumptively parole-eligible pursuant to the statute, and the inmate's case does not require victim notification. When the parole board conducts a file review pursuant to statute, the board notifies the inmate's case manager who, in turn, notifies the inmate. Then the case manager has the option of asking the parole board to reconsider its decision and hold the hearing in the presence of the inmate.

Mr. Dohr said the rule at issue today is Rule 10.02, which authorizes a file review in two additional circumstances. The first is when the inmate has been convicted of a class I code of penal discipline infraction within 12 months of his or her scheduled parole hearing. The second is when the inmate is within six months of his or her mandatory release date. As I stated before, the General Assembly has

specifically authorized the circumstances when a file review is appropriate and the conditions that apply to those file reviews. Moreover, the General Assembly has not authorized the parole board with any specific authority to create additional circumstances in which a file review may be conducted. It's the General Assembly's exclusive authority to determine when file reviews may be conducted, and, therefore, Rule 10.02 lacks statutory authority. We therefore recommend that Rule 10.02 of the state board of parole not be extended.

Senator Johnston asked what is your belief about the intent for the statutory allocations for file reviews? They seem to be split to me. For the immigration hold, the review may not be necessary because there is already an intervening plan for the person that will take place separate from parole, and the other seems to be because there are exigent circumstances that would make it more likely that they would need additional support. What's your reading on the legislative intent as to why there are these two statutory allocations? Mr. Dohr said I believe that the two statutorily authorized situations reflect circumstances in which the focus of the parole hearing or the decision of the parole board would not necessarily be based on the traditional things that the parole board would be looking at. When you're talking about special-needs parole, you're looking at whether this person is now incapacitated to the point where they don't really pose a safety risk, whereas most parolees who are going to be going back out into the community are able-bodied. The second circumstance is a situation where the person most likely, upon release, would be removed from the country. That's a situation, again, where you don't have the same sort of questions regarding public safety. I think those are the two common ties between those two circumstances.

Senator Johnston said this is a context where nothing can be learned from direct communication, because in a special needs instance the person is not physically capable of the potential safety risk that you would be assessing at a parole hearing, and in the immigration case the person is not at risk of being exposed to doing harm to the public because they are facing deportation. I think that's germane to the next discussion, which is what are the emanating beliefs behind the extension that the department is seeking around the places where they think there is also not a need or that there is nothing new that can be gleaned from an in-person conversation. The two contexts here are we don't believe you are capable of doing us harm or we think there is nothing you can tell us that would indicate that you ought to be set free because you have other legal recourse that's still coming. Mr. Dohr said yes, and I think that it's also important to note that in the statute, both of those circumstances involve cases where victim notification is not required. I think that also sort of ties into the whole thing where that is not something that is part of Rule 10.02.

Representative McCann said the attorney general's office opined in a very perfunctory fashion that the rule did not present legal deficiency. I've come to understand that that's fairly common and that's all they say. In the context of your examination, did you have occasion to talk to the attorney general who might have reviewed the rule or get a sense of what their conclusion that the rule was not legally deficient was based on? Mr. Dohr said I've not spoken to the attorney general's office regarding this matter. In our normal course, we do not contact the attorney general's office. There have been instances where I have been asked to speak to a department's specific attorney general when I have raised issues, but that has always come at the direction of the department.

Representative McCann said in Mr. Shaffer's materials that he submitted, he points out that there is qualifying language in addition to other statutory provisions. I don't know if you've had a chance to look into that, but he's arguing that that ensures compliance with the statute. Mr. Dohr said I have reviewed the materials that were provided and we had conversations prior to receiving the written memorandum from the parole board regarding the statutes that they've cited. Based on my review, those statutes have not changed our opinion. We still believe that the General Assembly has occupied the field in this case and, therefore, it is the General Assembly's exclusive province in this matter.

Representative Kagan said in the context of this section and other sections, are there indications that this is an exclusive list that you can refer us to? Mr. Dohr said I believe that the fact that the General Assembly has specifically decided to authorize two circumstances when file reviews are permitted and then has not said anything specific regarding the parole board's authority in this matter, it has exclusively limited the file review to those two circumstances. There's not necessarily anything in the statutory construction that says this is exclusive, but based on the fact that the General Assembly has outlined those two situations and then also not given the parole board any specific authority, we believe that it is a situation where the General Assembly has occupied the field.

10:14 a.m. – Brandon Shaffer, Chair of the State Board of Parole, and Rebecca Oakes, Vice-chair of the State Board of Parole, testified together before the Committee. Mr. Shaffer said I want to pick up where Mr. Dohr left off. The last thing he said was that there are only two provisions in statute where a file review is authorized. I would respectfully suggest that that is not true. There is already an exception in law that does not fall under section 17-2-201 (4)(f)(I), C.R.S. Specifically, section 17-2-201 (4)(c), C.R.S., provides an exception for exigent circumstances. There is already another instance in the statutory makeup that allows the parole board to conduct a file review that isn't under the specific section that Mr. Dohr referred to. Mr. Dohr said that the legislature has already occupied the field in this area, so that's the only provision we can use. The

legislature has occupied the field but the legislature has occupied the field in a number of different places throughout the statutory makeup, including this provision for exigent circumstances that doesn't fall under the specific section Mr. Dohr points to. Second, I would point out that the requirement to conduct a parole hearing in section 17-2-201 (9)(a)(I), C.R.S., says that whenever an inmate initially applies for parole, the board shall conduct an interview with the inmate, and at such interview at least one member of the board shall be present. Clearly, in an initial parole hearing a parole board member shall be present for that interview. Representative McCann asked about that phraseology in our rules that says subject to other provisions of statute, and that's what we're referring to. There are other provisions in statute that do require, specifically for that initial hearing, a parole board member to be present. However, section 17-2-201 (4)(a), C.R.S., says that if the parole board refuses an application for parole, the board shall reconsider the granting of parole to such person within one year thereafter or earlier if the board so chooses and shall continue to reconsider the granting of parole each year thereafter until such person is granted parole or until such person is discharged pursuant to law. So, the legislature expressed when they require that a member of the parole board be present for that initial hearing. It's in statute. However, when the legislature talked about the annual reconsideration, you didn't require that the parole board have a member there for the reconsideration. We're saying that if we are very specific for when we will avail ourselves of a file review, that reconsideration can be done without a face-to-face hearing. Also, the legislature did give the executive director of the department of corrections explicit direction to promulgate rules and regulations to change a parolee's parole eligibility date. Section 17-22.5-403 (1), C.R.S., says the executive director shall promulgate rules concerning when and under what conditions any inmate's parole eligibility date may be extended. Such rules shall be promulgated in such a manner as to promote fairness and consistency in the treatment of all inmates. Of course, one of the conditions under our new rules in which the parole board has the authority to conduct a file review is if there is a class I code of penal discipline (COPD) violation. The list of class I COPDs includes murder, manslaughter, kidnapping, assault on staff, assault on offender, fighting, etc. These are very serious violations that are now encompassed within the parole board rules. Please keep in mind that the parole board was transferred by a type 1 transfer, so we are an independent agency operating under the department of corrections, but we do operate under the department of corrections so that directive to the executive director can be imputed to the parole board as well.

Mr. Shaffer said I also would like to briefly give you some background on where this came from. After the assassination of Executive Director Tom Clements, there was a review of our parole practices in Colorado, looking at the supervision by the division of parole and the decision-making function of the parole board. The national institute of corrections came in and they looked at how we make

decisions. They were actually very impressed by the tools we have available to us. If you ever have the occasion to come down and watch us do what we do, we'd be very honored to have you and we'd like to give you the tour. We'd like to show you how we use the Colorado actuarial risk-assessment scale, and we'd like to show you how we use the parole board release guideline instrument - instruments that you all mandated that we use through legislation. We'd like to show you how we access our files from an internet-based function, something that most other states don't have the ability to do, so that if we are anywhere in the state we can look up an offender and look at their background. We have very sophisticated tools to help us with our decision-making processes. The one thing that the national institute of corrections observed, however, was that we didn't have time to review the files that we had in front of us. The way we scheduled our hearings was generated by a computer. A computer would indicate who was eligible for parole the Wednesday of the week before the hearings were conducted. We'd assign those hearings on Thursday, we'd get our files on Friday, you'd review your files over the weekend, and then you conduct the hearings the next week. That was a very impractical system because if you needed to schedule a personal appointment, you never knew what your schedule was going to be from week to week. One of the initiatives I undertook when I became chair of the parole board was to figure out a way to schedule our calendar at least a month out. Here with us today is Jennifer Wagoner who is the office manager for the parole board. Jennifer is the one who is the mastermind behind this whole thing and with her hard work and the hard work of her staff, we are scheduled four weeks out. We worked with the department of corrections who was very accommodating in helping us get to where we are today. The other thing the national institute of corrections observed was the volume. From January to the end of August this year the parole board has conducted 9,037 application reviews, which doesn't include revocation hearings, rescission hearings, sexually violent predator designation reviews, or probable cause hearings. Many of you are familiar with our two-step process where if you have a violent offender, they are reviewed by an individual parole board member and then they are reviewed by the full board. The full board has conducted 1,459 reviews. We have chosen to defer 49% of those hearings, we've released 28% of those to their mandatory release date, and we've offered discretionary release to 19% of those. For the way we've conducted the hearings, 49% have been done by video, 14% have been conducted face-to-face, 27% have been conducted by phone, and 10% this year have now been conducted by file review. That's a significant number; 10% is approximately 900 file reviews. It has increased our ability to focus on those hearings where a person has a real shot of being released discretionarily by the parole board. That was the intent and I think it's working exactly the way we intended it. I think it's authorized by statute, as I've already gone through. I think it's the right direction to go and I hope I've convinced the Committee of that. I would be happy to take any questions.

Senator Brophy said I read through Mr. Dohr's memo and your memo and talked with a department of corrections person. What I told them was my decision in here, unless there's something unconstitutional about what we're discussing, is going to be do the statutes allow you to make these rules or not. I do not believe it's appropriate to make policy by rule even if it's good policy. I think you've opened the door with the former notion that under exigent circumstances you have the authority to make rules. I think I get that, where the inmate has been convicted of a class I infraction within six months. That is an extraordinary circumstance where this person is so dangerous that it's wasting everyone's time and you might be endangering staff by handling this individual and you know he's not going to get out because there's no way you're going to do that after he's committed a murder or rape. On the second one, though, I don't see what is extraordinary about that - just that the inmate is within six months of his or her mandatory release date. Maybe I'm missing something, so what is extraordinary about that circumstance? Mr. Shaffer said the extraordinary circumstance is that it's very rare that we will discretionarily release somebody when they are within six months of their mandatory release date. The practical effect is, if we see somebody who is inside six months of going out on their release date - when you look at the administrative hurdles we have to go through just to process somebody out - it makes more sense simply to set them to their mandatory release date and go from there. When we set the rule we were looking at ways to focus us on people who were in the window where we would have a better chance of discretionarily releasing them. Obviously the class I COPDs remove people from that window. As you get closer to your mandatory release date, we know you are already going out, you have a date certain, you also exit that window. I understand where you're going with it. It's a lot easier to say that guy assaulted a prison guard therefore there are exigent circumstances and you're just going to have a file review. On the other hand, it really is a workflow, work management issue where the practical result is going to be the same. I have to caution you on one thing. When you talk about exigent circumstances the statutory provision is actually very tight. The type of exigent circumstances that they're referring to deals with calculation of time served and earned time, where your date comes backwards and your date goes forwards. So you're in the county jail awaiting trial and you're earning time the whole time you're in county jail and you're behavior is good so you get good time. And then the judge says I'm going to give you a six-month sentence, but you may have already done six months and you're ready to go out so the exigent circumstance that's in the statute itself is specific to the time calculation. The point I'm making isn't that it's exigent circumstances; the point I'm making is that there's another exception in a different part of the statute. The Office's argument is that since the field has been occupied in this specific statute, the one the Office has cited, with the two exceptions, no other exceptions could be authorized from statute. I'm saying that since the annual review, after that initial hearing, is a reconsideration - not a hearing - and if we have done that initial hearing with a board member, then

there is the opportunity to do an administrative file review for that reconsideration specifically because there are other exceptions in other parts of the law. The field is occupied in this place but there are other exceptions and the exigent circumstances provision is that exception that I'm referring to.

Representative McCann said I appreciate the work you've done on this and I understand the policy reasons. I'm struggling with the fact that the statute is pretty clear. In my mind it's not really ambiguous, especially now that you've told us that the exigent circumstance piece is circumscribed in the statute. I'm struggling with that distinction between what's actually in the statute versus what you've done in the rule. I have one question about the victim notification. In a memo you prepared to the department of corrections about how this new rule would be implemented, it sounds like the victim is notified of the file review and the victim has an opportunity to make a statement. Is that right? Mr. Shaffer said we rolled this rule out in February and we had some lessons learned. The original design was to allow victims to call a board member and have a conversation and provide input before the file review was conducted. As a practical matter, that became very burdensome, so we simply don't do file reviews for cases where there is a victim that has expressed a desire to attend. We simply schedule those for a hearing and conduct those out of respect for the victims.

Representative McCann said so if a victim expresses an interest in making a statement, then you go back to an in-person interview with the inmate. Mr. Shaffer said yes. Rebecca Oakes is more knowledgeable in how the victim services unit works, so I'll let her elaborate on how you can register for notifications as a victim.

Ms. Oakes said as you know under the victims' rights act, victims have the right to be present and heard at certain critical stages in the criminal justice process and parole board application hearings are one of those. The department of corrections solicits notification from victims of violent crimes typically, crimes that fall under the victims' rights act, and enroll those victims to provide notification for any critical stage, such as discharge of a sentence or movement to a lower facility. When we receive notice from the victim services unit that there is an enrolled victim, that's when we take the offender out of our file review classification and schedule them for an actual hearing. The victim will then receive notice as to when and where that hearing will occur and that they have the right to be there, participate, and provide input.

Representative McCann said the inmate also has an opportunity to make a statement or to be interviewed when you are doing that kind of review. Is that right? Ms. Oakes said yes, that's true.

Senator Steadman said I'm going to bring us back to something Senator Brophy said a moment ago that I strongly agree with, which is that we're really here to review procedural issues around whether there is a grant of statutory authority for the rule-making. Some of the policy issues about how might the parole board operate more efficiently and incorporate victim participation and those sorts of things really aren't germane to the decision before us today and the recommendation from staff. I look at the statute and I see explicitly that the parole board has been granted a specific power to do file reviews if it concerns a special needs parole or an immigration detainee. I think we've been fairly circumspect in what power we've granted to the parole board. There's an exigent circumstances exception as well, but I didn't understand any of your arguments to suggest that the rule was sustained by the exigent circumstances provision, that you were really just informing us of that to let us know that there's three different circumstances in statute where file review is permissible. Staff is making the argument that those three are the exclusive three grounds for which file review is permissible under today's statutes and all of the discussion about the policy benefits and the efficiency for the parole board and its operations I think lends itself better to a discussion about how the statutes might be amended rather than the question we need to dispose of today. That's my view of the issue.

Representative Kagan said regarding these three circumstances, are those the only circumstances in which an interview can be substituted for a file review? It is permissive language because it says the parole board may conduct the assessments by file review, but it doesn't say "only if", and it does strike me that if we wanted to make it an exclusive list, we know how to do that in statute and we could have said the parole board is empowered to do this only if and we just said "if". I think there is ambiguity there and as long as there is the ambiguity there then I think it does behoove us to say what was the intent of the legislation. Was it the intent to make this an exclusive list of the only circumstances in which a file review can be done or was the intent to say that these are definitely circumstances in which a file review can be done but there may be others. I think it's arguable that if we wanted to make it exclusive we could have done that and we didn't.

Senator Johnston said I'm also trying to square these two sections of the statute. The only section that actually indicates an interview is required is section 17-2-201 (9)(a)(I), C.R.S. It says it only requires an interview for the initial application. Then it says the rest of the appeals shall be governed by section 17-2-201 (4)(a), C.R.S., where it only says the board may meet as often as necessary to consider all applications for parole. It does not say reviewed in person or by file review. One argument to be made is that it makes the exceptions in section 17-2-201 (4)(f), C.R.S., unnecessary if there is no need to specify file review sections; if all of them can be file reviews under (4)(a) why would you need the exceptions under (4)(f)(A) and (4)(f)(B). It does seem to me that the

language of the statutes requires an interview and the only place I see an interview required is in (9)(a)(I) for the first hearing. The rest of (4)(a) only requires a review. I do feel that there is some ambiguity. Would your reading of this be that any reviews could be file reviews after the initial application under (9)(a)(I)? Mr. Shaffer said that's correct, yes. However, I think that any file reviews that the board does would have to fall within the scope of rules and regulations promulgated by the board. I don't think that could be an arbitrary decision. I think there would be the need to set parameters around how we would do that. I would go back to the language that directs the executive director to promulgate rules in cases where there are COPD violations or discipline violations. It does give him the authority to do that and that's essentially what we've done. That deals with the COPD issue; it may not deal with Senator Brophy's issue that he raised regarding MRD releases. If we pass rules that set forth the parameters, then the answer is yes.

Representative Foote said for me it seems like the issue I'm trying to resolve in my head relates to the occupy the field saying, and this might be more of a question for Mr. Dohr. I'm wondering how broad of a field did the General Assembly occupy? I think what the parole board is saying is that the field the General Assembly intended to occupy involves the reconsideration statute and the broader section 17-22.5-403, C.R.S., that says the executive director shall promulgate rules concerning when an inmate's parole eligibility may be extended. If you read the rule under those statutes, it seems to me the field is broader. It seems to me that the rule that has been promulgated fits under those particular statutes. But, if you look at section 17-2-201, C.R.S., which is the release reviews, I'm not sure it's so clear. It's tougher for me to see that it fits under that. My bigger question is why is it that Mr. Dohr has determined that the General Assembly has decided to occupy the field under section 17-2-201, C.R.S., as opposed to occupying the field under the reconsideration statute and section 17-22.5-403, C.R.S.? Why are you taking a more specific statute viewpoint of the field being occupied as opposed to the broader ones?

10:44 a.m. – Mr. Dohr testified again. He said we're making that claim because we are looking at the more specific statute over the general statute. We feel like when there has been a specific decision made by the General Assembly, there's greater weight given to that than some of the more general statutes that have been pointed out by the parole board. The other thing that I would like to follow up with is the executive director's authority. The rules in this case were promulgated by the state board of parole, not the executive director, so that authority does not apply in this situation.

Representative Foote said to follow up with something Representative Kagan brought up, which is that under section 17-2-201 (4)(f), C.R.S., it says to conduct a

parole release review in lieu of a hearing without the presence of the inmate "if". It could have easily said "only if" in those cases.

Senator Steadman said I wanted to jump in because Representative Kagan made this argument. I think it's important to step back and start at the very top of the statutory cite. This section enumerates powers and duties of the parole board. There are specific enumerated powers and when you're looking at a list of enumerated powers as we are in this section and you see a power granted with the qualifier "if", I read that as a word of limitation, that we're limited to these circumstances. The General Assembly has granted specific enumerated powers to the parole board and included certain provisos. They have the power to do file reviews "if" (A) or (B). I think it's important to understand that context, that this is a statute by which the General Assembly is granting enumerated powers to the parole board and, in my view, added limitations to those powers.

Senator Johnston said my challenge to that is that subsection (9) is also enumerated powers of the parole board and (9) is the only place in the statute that explicitly requires an interview. It says an interview is required when an inmate initially applies for parole and then it refers, for all future hearings, to subsection (4)(a). Nothing in (4)(a) requires an interview. My question is if we were explicit in (9)(a) about the requirement for an interview, why wouldn't we be explicit in (4)(a)? There is either tension between (4)(a) and (4)(f) or there is tension between (9)(a) and (4)(f), and so how do you read that dispute? Mr. Dohr said again it goes back to the more specific language that's in (4)(f) and that language indicates the General Assembly's decision to limit the circumstances in which a file review may be conducted. You have some general language, but then specifically later on the General Assembly has provided two specific circumstances of when file reviews may be conducted. I think, to go further, if the General Assembly had thought that this was something where the parole board's expertise could be helpful in determining additional circumstances authority could have been granted, then in that powers statute they could have said additional circumstances that the parole board promulgates by rule for file reviews. The General Assembly did not say that so I think without that very specific authority, the rule lacks statutory authority.

10:49 a.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rule 10.02 of the State Board of Parole and asked for a no vote. Representative McCann said I agree with Mr. Dohr's position that the statute is unambiguous and specific about the circumstances under which the board can conduct file reviews. I sympathize with the parole board because those statistics are overwhelming. I don't know how you get through the volume that you get through. I would be very supportive of a statutory change and a bill to allow the

parole board more discretion to decide when it should have a file review. I am concerned about what I perceive to be a pretty specific statute. I think the points raised have been good about this initial application requiring an interview but I agree with Mr. Dohr that the more specific statute would supersede that. Again, that's something we need to look at statutorily because I definitely think the parole board needs the discretion to make some of these decisions given that high volume of work. The motion failed on a vote of 3-7, with Senator Guzman, Senator Johnston, and Representative Kagan voting yes and Senator Brophy, Representative Foote, Representative McCann, Senator Roberts, Representative Scott, Representative Waller, and Senator Steadman voting no.

10:52 a.m. – Julie Pelegrin, Assistant Director, Office of Legislative Legal Services, addressed agenda item 2b - Rules of the State Board of Education, Department of Education, concerning administration of the "Colorado Educator Licensing Act of 1991", 1 CCR 301-37 (LLS Docket No. 140250; SOS Tracking No. 2013-01195).

Ms. Pelegrin said I bring to you today rules of the state board of education. As I've discussed in this Committee before, for a school district to employ a teacher, the teacher either needs to be licensed or to hold an authorization. There are several forms of authorizations that are authorized in section 22-60.5-111, C.R.S. That section describes several types of authorizations and says the department may issue authorizations to persons who meet the qualifications prescribed within that section and by the rules of the state board. That's the board's authority for rule-making. Today we're going to be talking about the career and technical education (CTE) authorization. This authorization is somewhat unique among the others because there is an overlap between high school and postsecondary. You have CTE classes that are taught at the high school level by the teachers employed by the school district and you also have CTE taught at the community college level by persons who are certified or credentialed by the community college system. Section 22-60.5-111 (9), C.R.S., sets out the qualifications for obtaining a provisional CTE authorization and a professional CTE authorization. Both of those are tied to holding the credential that is issued by the state system for community colleges. So, if I hold the provisional community college credential, I can get a provisional CTE authorization and if I hold the standard community college credential, I can get a professional CTE authorization. The state board adopted Rule 4.04, which sets the requirements for obtaining the initial CTE authorization as an applicant who demonstrates evidence of the successful completion of required relevant training, occupational experience, and coursework, and then you can get a five-year or professional CTE authorization if you hold an initial authorization. The rule itself does not refer to the community college credential at all. On its face, Rule 4.04 appears to conflict with the statute because it doesn't have that reference to the community college credential.

Further, by setting out in Rule 4.04 (1)(b) that they have to show evidence of the successful completion of required relevant training, occupational experience, and coursework, the rule doesn't tell you what that required training is so it also has vagueness issues. Based on both the conflict with the statute and the fact that the rule is vague, we recommend that Rule 4.04 of the state board not be extended. The department is not contesting our conclusion.

Senator Johnston said I think this rule issue is clearer than the last one. I want to applaud the department of education for trying to be innovative and entrepreneurial, trying to find ways to help support rural districts, and finding more creative options for getting people from career and technical fields to come and teach. It turns out that if you've spent 30 years in an industry you probably didn't go back and spend $20,000 in a year in higher education to get a certificate to prove you know something about welding when you've spent 30 years actually doing it. I think this calls out a real gap in our licensing statutes to provide the needs we offer to schools today. I know the department is working on this and I think it calls attention to the fact that we'll need to take some legislative action on providing more flexibility to districts who are trying to get practitioners from our communities to come in and help support our kids.

10:57 a.m.

Hearing no further discussion or testimony, Representative Kagan moved to extend Rule 4.04 of the State Board of Education and asked for a no vote. The motion failed on a vote of 0-10, with Senator Brophy, Representative Foote, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, Senator Roberts, Representative Scott, Representative Waller, and Senator Steadman voting no.

10:58 a.m. – Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, and Dan Cordova, Colorado Supreme Court Librarian, addressed agenda item 3 - Update on the work of the Legislative Digital Policy Advisory Committee.

Ms. Gilroy said I'm here as a member of the Legislative Digital Policy Advisory Committee, which was reestablished by bill by the General Assembly this past session. In a show of support and enthusiasm, we have employees from the Secretary of State's office who are here to back us up because they have already implemented the uniform electronic legal materials act (UELMA), which our committee is addressing right now. You received last week the progress report from the advisory committee. Also, I posted a blog on LegiSource that gives you a thumbnail sketch of what the advisory committee is doing and what UELMA is all about. Our chair of the advisory committee is Dan Cordova and I've invited him to

chat with the Committee today briefly about what we're doing, so that you're up to date, and when legislation may come forward you'll be attuned to what's going on.

Mr. Cordova said this presentation is really in the form of a select summary of the work of the advisory committee in its first year and our future goals. As Ms. Gilroy said, when the General Assembly established this important work by adopting UELMA, it basically did so in a unique fashion. We were the first in the country. Now there are nine states that are grappling with this issue and none of them yet know exactly how they're going to do it. Here we are in a wonderful situation where not only do we have a date certain – the end of the year 2017 - for the General Assembly to go official, but also we have the secretary of state's office who is already compliant in the authentication aspect. I might also add that it's an award-winning program. Something is being done in Colorado that's exciting and something is being done in Colorado that's very right. There's been a great amount of collaboration around the table. It's exciting to have a multi-branch approach to something like this. It's also amazing to see people come together who might have different understandings of technology and different ideas of how to implement it saying to each other how about this and imagine that, all for the benefit of statewide access to public law in Colorado for citizens in all four corners of our state for free. That said, this collaborative work also takes the form of preservation of historic materials or materials that will become historic as time goes by. We are also talking about how we are going to preserve and archive those new laws and how to tether those back to current law that is only in print format. As you probably also know from our report in November as well as this one, we are also looking at how we are going to connect proceedings that are taped in audio format historically through legislative histories to law prospectively being passed. It's a heavy lift. We're excited about it because we think we're meeting future clientele - citizens of Colorado - where they are now as they're adopting emergent technologies. Here we are in a situation where we are watching the nine other states and the two or three different technologies that exist to authenticate these electronic legal materials, watching them do that in the face of challenges to these stable technologies and do that in a way we can maintain stability and authenticity. We're fortunate in a sense that the legislature has a very skilled IT team who, in-house, will be taking on all of the work to make this happen. That's three years down the road, but we are here talking to you about this to keep it in front of you, keep you informed, answer your questions, and make sure we're doing this right. This is a measured approach to something very important and if we're going to be first in the country to do it, then let's do it right. Now, at the cusp of creating this on-demand free statewide service for our citizenry and ourselves, it's important to note that under the act the publishing branch of government will control the law, but we are proposing a hub and spokes approach to how everybody in the state will link to it, which is to say that while the

legislature will control the session laws and the codes as they are published, either electronically or in print however we decide to preserve that, we do want to make sure that everybody in the state and elsewhere has the ability to link to it on demand and from wherever they might be. We're bridging old and new formats - the print and the electronic - but we also want to make sure that we're serving the public in terms of their own interests and their requirements as they move into adopting new technologies. So, we're talking about multiple formats and how we're going to specifically do these things. It has been amazing for me as a newcomer to a lot of what happens under the dome here to watch professionals do this work in such a collaborative way and to be a part of it. I want to thank you for that. This innovation, this measured approach, this customization to Colorado, and this timeliness that we have is something that we want to trade on in the way of future success.

Senator Steadman said thank you very much for your service. The creation of the advisory committee was something initiated by the JBC pursuant to a staff recommendation we received because of some issues at the state archives. Clearly the issues go beyond the state archives and the department of state is already UELMA-compliant with the state regulations. I think there's going to be some decisions for this Committee in a couple years about when we start publishing our statutes in a UELMA-compliant manner.

11:08 a.m. – Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed agenda item 4 - Discussion of a legislative change to section 24-4-103 (8) (e), C.R.S., to delete the requirement of notification of co-sponsors under the S.B. 13-030 process when executive agencies adopt rules implementing newly enacted legislation.

Ms. Haskins said in 2013, Senate Bill 13-030 was enacted by the General Assembly, which was sponsored by Senator Scheffel. It required that the Office of Legislative Legal Services notify legislators about when rules were submitted to the Office as a result of newly enacted legislation. We worked with Senator Scheffel trying to figure out how to implement this requirement and developed a process where we notify legislators about these rules that relate to newly enacted legislation. We notify them by e-mail. The legislation requires that we notify the prime sponsors of the legislation and the cosponsors of the legislation. What has been handed out to you is an example of two of the e-mail notices that went out on two different bills. As you can see, there is a very long list of legislators who are getting these e-mails and that is because of the cosponsor requirement in the statute. When we talked with Senator Scheffel initially about this, he made an off-the-cuff comment "we included cosponsors in that?" We said we think the statute clearly requires that the notice go to the prime sponsors and the cosponsors and so that was how we were going to implement it. The fiscal note on the bill indicated

that the plan would be that the notices would go out by e-mail. We developed this system where we send out the e-mail notice and in the notice it indicates the bill and bill title and also provides a link to the actual rule that has been submitted. If you click on that link it will take you right to the CCR. We have received some anecdotal comments from legislators who are not sure about why they're getting the e-mails. We also had some situations where we would have multiple filings from the same agency to implement the same bill. Initially what we were doing was treating them as independent notices and so legislators would maybe get a series of e-mails on the same day and they were wondering if there was a computer glitch with our Office. We modified our procedure a little bit to try to consolidate the e-mails so that we're still providing the same notice but not in multiple e-mails. After implementing this we are wondering if notice to the cosponsors might be a little more than we need to do and so we wanted to bring this up to the Committee as a possible change to the statute. I have been trying to reach Senator Scheffel for the last three weeks to get his feedback but I have been unsuccessful. I don't know what his feelings are about a tweak to the statute. The Committee does have the authority to introduce bills and they don't count against a member's five-bill limit. The Committee has, in the past, suggested changes to the "State Administrative Procedure Act" and this change is in the act. The second handout is the actual statute that includes the notice requirement, which is in section 24-4-103 (8) (e), C.R.S. The suggestion, if you're wanting to do this, would be to strike out the words "and cosponsor". We still would be sending the notice to the prime sponsor of the bills. Also, the statute does require us to notify the applicable committees of reference about these rules coming in that relate to legislation that the applicable committees of reference heard. We have decided that the notice should be done annually. We'll be sending an e-mail to the committees of reference in January right about the time session starts. We've created a chart by committee, which is already on our website, so you can look at all the rules and bills that have come in that were heard by a committee. When we send out the e-mail to the members of the committee of reference, it will link exactly to the part in the chart related to the committee that member sits on. We decided, as an administrative decision, not to send e-mails to every member of a committee of reference in every instance. Just to give you an idea of the volume that we've been dealing with, there are 147 rules that have come in that related to new legislation. We've sent out e-mails like this relating to 147 sets of rule filings.

Senator Brophy asked was this brought to our agenda because it's an additional work burden to staff to add cosponsors to the notification or is it that legislators have complained about spam coming to their inboxes? Ms. Haskins said it is not a workload issue for the staff. This is very easy for us to implement. Our IT employee, Wade Harrell, figured out how to do this where it just pulls the information into the e-mail. It's not a workload issue for the Office, but it's that

we were getting comments back from legislators about why are they getting all these e-mails or is there some computer problem.

Senator Brophy said I'm sympathetic about the amount of e-mails we get. The other side of that is if you're on any of the interim committees where we work all summer to craft legislation that then falls into the hands of bureaucrats to actually implement through rule, we have ownership of that more so than just raising your hand at the end of a third reading vote to be added as a cosponsor because you like the thought of the legislation. I would encourage legislators to be diligent about sorting their e-mail and I think there are very good reasons for why cosponsors should be kept on the list. What it might do, if you don't like the e-mails, is keep you from cosponsoring.

Senator Roberts said I'm with Senator Brophy. I think if I cosponsor a bill it's sort of an additional responsibility. How it's being implemented goes back to whether it is effective - is that bill doing the job that we understood it was going to do? I think since it's not a burden for staff, cosponsors should be kept apprised of how the bill is being implemented by a department, which may veer off from legislative intent. This Committee is a great committee for trying to make sure we have the three branches of government working the way they should be.

Representative McCann said I'm of the opposite view. We know that a lot of people sign on as cosponsors but don't intend to really follow in detail every bill that they are cosponsors of. If they're interested in what the rule is, a legislator can always contact the department and get a copy of the rule and can attend rule-making and have input if they wish. I would be inclined to support the request to remove cosponsors from required notification.

Senator Steadman said I cosponsored a lot of bills this year and was surprised at the volume of e-mails that I got. From my perspective, it was not helpful to be inundated like that. One of things we did during the JBC hearings this past budget cycle was to pose a standard question to all departments to brief us on legislation that had been passed but not implemented by the agencies. It was very instructive and I intend to keep doing that because I think there are important checks and balances between the branches about us not just passing a bill and walking away and thinking our work is done. I've also found out about things since then where agencies haven't implemented things that they neglected to tell the JBC in response to our questions. It's understandable because I think there are a lot of things that get passed and forgotten. I do think it's important for the legislature to exercise some sort of checks and balances against the executive branch on this issue of implementation and rule-making, but I think it's a little different to presuppose that dozens of people want to have a link to the rule in their inbox. I was wondering whether a different approach to this might be to create an opt-in or

opt-out system where you can put yourself in a position of receiving these notices or put yourself in a position of putting yourself in an opt-out list. Maybe that's a better way to amend the statute because right now the statute directs staff that they shall send these notices to every sponsor and cosponsor. Even if I went into the Office and begged to opt out of receiving these e-mails, I don't think the staff is statutorily authorized to let me opt out. I don't know technologically how well we could automate an opt-in or opt-out system, but it seems like an alternative way of getting at this. Right now I think it's overkill. It's not useful information to me because I'm not going to click on the link in 20 e-mails I receive in one day to read what's often quite extensive rule-making texts. I get a lot of e-mail in my inbox that gets automatically deleted as it is, and this is just contributing to that problem. I would be inclined to do something different with the statute.

Senator Roberts said opt out is okay with me. I don't think it should be opt in. I appreciate that perspective, but I still do think cosponsoring shouldn't be a popularity contest, but that you actually want to know how it's being implemented. I do understand the inability to get people off if legislators don't want it and that staff is kind of in an awkward spot. The votes of the Committee will decide whether it goes forward. I would oppose it unless it was opt out.

Senator Johnston said I like the opt-out recommendation. I think that's a good compromise.

Representative McCann said the only issue I have with that is that it sounds like the computer automatically takes all the sponsors and cosponsors and transfers them. I think the workload of the Office to figure out who's in and who's out might be pretty overwhelming.

Ms. Haskins said I actually did have a conversation with Mr. Harrell about whether we could do some kind of opt out and how that would be done and he assured me that there was a workable way to do this without a lot of effort. I believe we could do that without impacting the workload of the Office.

Senator Steadman said it seems that an opt-out opportunity would at least respect each individual legislator's preferences around this, so maybe that's the direction to head. On the JBC, we have the power to initiate legislation on a unanimous vote of the committee but we always do it in a two-step process. We first request a bill draft and upon the unanimous vote of the JBC we will have a bill drafted and presented to us and have a chance to review it before we have a second vote on whether to introduce it. I've been advised that the unanimous vote is a peculiar part of the JBC rules that would not apply to us; it would take a majority vote of this Committee to request a bill draft. It would probably also give staff an opportunity to explore the mechanics of how an opt-out mechanism would work

and they could probably present more information to us at the time that they bring a draft of that legislation back for final review and introduction.

Senator Guzman said I just wanted make sure that this would be an opt out for the cosponsors, not the sponsors. Ms. Haskins said that's my understanding of what the Committee is interested in doing and that was what we were suggesting.

Senator Steadman said I think we could offer the sponsor the same opt-out opportunity. It's their choice how much information they want presented to them. I would be inclined to let either sponsors or cosponsors opt out.

11:27 a.m.

Hearing no further discussion or testimony, Senator Steadman moved that the Committee request a bill draft to see what an opt out would look like. Senator Steadman said if this motion is approved that draft would be presented to us at our December meeting along with some additional information about how this would work as a practical matter. The motion passed on a vote of 10-0, with Senator Brophy, Representative Foote, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, Senator Roberts, Representative Scott, Representative Waller, and Senator Steadman voting yes.

11:29 a.m.

The Committee recessed.

11:36 a.m.

The Committee returned from recess.

11:37 a.m. – Debbie Haskins addressed agenda item 5 - Discussion of a COLS Handbook and Input from the COLS on a Policy in the Handbook for Requests to Review a Rule Out of Cycle.

Ms. Haskins said the Office has been working on a COLS handbook. We thought it was time for us to write some things down. We want to include things about the rule review process, the duties of the Committee, the duties of the Office, how members are appointed on the Committee, some procedural things that we think would be helpful to the Committee, and procedures for retention of counsel and how that is usually handled. As we were starting to work on the handbook, one of the issues was how to deal with requests to review rules out of cycle. We would like to get the Committee's feedback about the proposed policy on how our Office and the Committee makes decisions about requests to review a rule out of cycle.

Part of the impetus for this is that occasionally we are asked to review rules out of cycle and the policy is not written down and we sometimes struggle with how to respond to it. Our goal was to come up with a policy that would be transparent, fair, and consistent. We felt like having it in writing would really help us to have a policy that would be transparent, fair, and consistent. A request to review a rule out of cycle relates to when the rule was adopted and when we are being asked to review a particular rule. It's a November to November year and then the rules automatically expire the following May 15 unless extended by the General Assembly acting by the rule review bill. An out-of-cycle rule is either an old rule that was adopted a while back and was already extended in a previous rule review bill or it's a very brand new rule that's just been adopted by the executive branch agency and it's subject to next year's rule review bill and there's an interest to review the rule right away. That's the context we're talking about when we say out of cycle; we're talking about an old rule or a brand new rule. Our proposed policy begins with allowing any legislator, regardless of whether they are a member of the Committee or not, to ask Office staff to review a rule. I want to point out that it says "any legislator" so a lobbyist cannot get our Office to review a rule out of cycle. In the past there's been some confusion about whether any member of the General Assembly that's not on the Committee can ask for the review. Our feeling was we have an institutional client - the Office works for the entire General Assembly - so we should do the review for any member of the General Assembly. The next decision point is what do we tell the Committee and who do we tell on the Committee - is it the Committee Chair or the whole Committee – that we have been given a request to review a rule out of cycle. Another decision point has to do with the confidentiality of this request. Should we tell the Committee members or the Chair who has requested the review? Next, the proposal states the Office's review will be based on the review that we do for any rule. It's the three grounds in the "State Administrative Procedure Act": Does the rule lack statutory authority; does the rule exceed the agency's statutory authority; or does the rule conflict with the statutes. Then there's another confidentiality issue question about do we tell the agency, if we need to talk to the agency in order to finish our review, that we're reviewing this on behalf of a member and identify that person or do we just contact the agency that we're doing the review and keep the name of the legislator confidential? Then in the next item, the question is what do we do if the staff finds an issue with the rule. Our proposal is we should follow the same procedure that applies to rule review within a cycle. If we find a rule review issue, we prepare the rule review memo, we contact the agency, and we place the issue on the agenda. If we find a problem with the rule we would just schedule it like we normally would and would follow the confidentiality protocols that we apply to in-cycle rule review issues. We will provide a copy of the rule review memo to the members of the Committee and to the affected state agency a week before the meeting and it will be posted on the web site. If it was a legislator not on the Committee who requested the review we would give them a copy of the memo at

the time we provide it to the Committee. The next item in the policy goes through the alternative. What should the process be if the staff reviews an out-of-cycle rule and we find no problem. Our feeling is that we would notify the person who requested the review and then, depending on whether we were working only with the Chair or the whole Committee, we would let you know what the decision was, and that the staff would not take further action regarding the rule. We would not put it on the agenda because we don't think there is a problem with the rule, unless the requesting legislator or a member of the Committee asks the Chair to place the rule on the Committee's agenda. That's another decision point, with what happens if the person who requested the review disagrees with our conclusion and wants to have the hearing. If it is scheduled on the agenda, our view is that if someone has requested review and our staff feels that the rule is authorized and we are recommending that the Committee not take any action on the rule, then the burden of persuasion is on the legislator who requested that review and continues to assert that the rule is not authorized. We would still make a presentation, but you all need to vote based on what you think is the right decision just like you do with any other rule review issue. Next is about if an issue comes before the Committee, what are the options that the Committee would have at that point. The main three options are that the Committee finds that there is no issue with the rule and you take no action on the rule, which has the effect of continuing the rule; second is that the Committee finds there is an issue with the rule and - if a rule is out of cycle it is not subject to that automatic expiration - you repeal the rule and then we would include that in the applicable rule review bill and it would be repealed effective May 15; third is to delay taking action until the next year. That may depend on whether this is a brand new rule, easy to deal with it in the next cycle that it would be subject to, or you don't want to take action right now and will address it at another time. The last sentence in the policy just points out that regardless of whatever action the Committee takes on one of these out-of-cycle rule review issues, the rule review bill is subject to the legislative process. It goes through both chambers and other legislators may try to amend the bill on second or third reading in either chamber to address the out-of-cycle rule. You may feel like you've addressed the issue in committee, but it may come back on the floor. We have always advised our Committee members over the years that it's really important to follow the rule review process, that this Committee has a very important role to play in reviewing rules, and that amendments on the floor should be avoided, especially if the Committee has not heard the rule issue. We've always advised not to circumvent the regular rule review process and do an amendment on the floor, but to bring that issue properly so the Committee can hear both sides and weigh the issues. That's a summary of the some of the points in the policy. We want to get your input on it and would like to bring the whole handbook to you again probably in January.

Senator Steadman said I want to start with the last sentence in the proposed policy. I see a real tension with being surprised with a floor amendment where we have not had any discussion in the Committee or any input from staff about whether there is an issue with statutory authority for the rule and we end up trying to deal with it on the fly with a floor amendment to the rule review bill. There's a tension between that and allowing the other 90 members of the General Assembly to drive the agenda of this Committee by being able to request and force things onto our agenda. There's a provision in the policy that says the requestor can decide, even if staff doesn't have an issue, they want a decision from this Committee. How much would we let other members set our agenda is an important procedural thing to talk about. I see the merits of both perspectives here because I've been surprised by floor amendments to the rule review bill that we didn't have an opportunity to discuss, and yet I'm a little reticent to allow other members of the legislature to force issues onto the agenda of this Committee. I look at the audit committee as one thing we can compare this to, but it's a little different there. With the audit committee an affirmative vote of the majority of the audit committee members is required before the staff goes forward with an audit and the audit committee functions to help ration staff resources so the audit staff isn't expending a lot of staff resources. An audit, in terms of the staff resources expended, is a little different than a rule review and I don't know how long it takes to review a typical rule but some are easy and some are complex. To what extent should our Committee function as a gatekeeper around enabling the use of staff resources? I think it's different than an audit because of the role of the Office being legal counsel to each member of the General Assembly. If we had some sort of gatekeeper function and vote down their request, they could still go ask the Office to prepare a legal memo for them or still require the Office to do some work. I don't think we have the same interest in being a gatekeeper to staff resources that the audit committee does because there's lots of ends around that. That's some of the tensions I see in this and some of the interests in terms of how we do our work and how staff does their work. I think all these issues are raised by this proposal. I think the proposal has merit that we have a written protocol and we treat these things consistently, but I think there's several different decision points along the way that we might want to talk through.

Senator Brophy said I want to start off by saying that from a big-picture perspective I think the legislature should always have the right to review executive branch rule-making if it infringes upon our constitutional duties. Second, also from a big-picture perspective, I don't see how reviewing of rules falls under GAVEL protections, so I think that it would be appropriate for the Chair of the Committee to be able to deny an agenda spot to another member of the legislature if staff and the Chair agree that it did fall within the bounds. Historically, chairs have been able to do that. GAVEL changed that, but I don't think rule review falls under the protections of GAVEL. I think we have that kind of coverage where the

Chair would be able to control the Committee agenda, and appropriately so. As the person who has often run the amendments on the floor, I would never want to tie the hands of a legislator when it comes to the offering of amendments on the floor. Finally, I think we inherently know how to deal with this. If it becomes too big of a burden for staff, then we start treating these things along the lines of the way we do resolutions, so that if too many members of the legislature are making too many requests of staff to review rules, then we do a new rule of the General Assembly that any individual member can request a limited number of rule reviews in any annual period. That way if you end up with a legislator who wants to become a pain and they submit five a week and it's taking up too much staff time, you have the ability to rein that in. I don't see that we're at that point yet, but I think that's how we could deal with this. For one of the decision items I would strongly suggest that we put in the handbook that the Chair of the Committee has the ultimate authority with regard to what will or will not find a spot on the Committee's agenda and then make a note for future general assemblies that the General Assembly has the authority to limit the number of rule review requests any individual legislator can make on an annual basis.

Senator Johnston said just to be clear, Senator Brophy's suggestion would be that a legislator can request the review of a rule by staff, staff would make that review, and they would come to the Chair and say we think the rule is alright and there's no need for further action and the Chair could say for that reason I don't think the Committee needs to hear this issue. Or, if staff does think there are conflicts about the rule, the Chair would say this is worth the entire Committee looking at.

Senator Brophy said yes and - this is the way I think it ought to be - even if staff finds there is an issue with the rule and the Chair doesn't want to hear it, I still think the Chair would have that authority. I don't know how long you would stay on as Chair, but I think you might have that authority. I want that, by the way, because I don't want this to be staff-driven.

Ms. Haskins said I just want to point out that when we do regular rule review and we find an issue with a rule, the staff schedules it and we have never asked the Chair about that. This is a different scenario, so I think there is a question of should the Chair be the one who decides if it's on the agenda or not. I think that's a policy choice for this Committee to make about how you want to use your staff resources on this.

Senator Steadman said there are a couple other issues we should probably talk about. One is confidentiality. I believe that when a legislator goes to the Office and makes any kind of request, that's an attorney-client privilege relationship. I particularly like the provision in here that when this happens staff does not disclose the requesting legislator to the agency or department in question. But

there is the provision about notice to either the Chair of this Committee or to the entire Committee. I actually think that it would be fairer for the entire Committee to receive that notice, but then I think there's a question as to whether there's any obligation to keep that information confidential from the members of this Committee to be privy to the fact that a member has gone to the Office and requested something of their attorney that relates to the performance of their legislative duties. I also look to the audit committee as a model for how some of that confidentiality is handled.

Senator Brophy said I think we're balancing attorney-client privilege and the historical importance of that versus accountability. The audit committee is interesting in that it is evenly split between the parties. We don't necessarily have that on this Committee, but the solution that's tried and true I believe is notification to the Chair and the ranking member, just to make sure there's no partisan shenanigans going on when what we're really looking at here is more policy-related. I understand that it's hard to separate them but at least that gives you the opportunity to have accountability along with confidentiality. I would make the motion that when it comes to notification, rather than notify the entire Committee, I would say that we notify the Chair and ranking member.

Senator Steadman said because we're a joint committee, who do you consider the ranking member from the minority party? A senate member or house member? I appreciate the fact that you're trying to narrow it to notice to fewer people because then there's a greater chance that it does stay confidential, but I'm not sure as a practical matter that we can really narrow it down like that. That's why I said the entire Committee deserves to know but I think that there should be some expectation that the requesting member's confidentiality is respected.

Senator Brophy said the solution to the selection of ranking member is simple. It's the same way that we choose the Chair. You flip back and forth and let the various members of the Committee vote on who would be ranking and who would be Chair. That way if it slips out there's only two people you have to question about it and it will significantly reduce the probability of that happening.

Ms. Haskins asked is the staff to notify the Chair and the ranking member of the minority party in the same house that we have a request and disclose the name of the person who requested the review, or are we just telling those two people that we have a request to review a rule?

Senator Brophy said I would keep the name confidential.

Senator Steadman said I tend to come down on the side of respecting the right of each member to access the Office and perform their duties. There is the question

about whether this becomes abusive if we start seeing a high volume of these out-of-cycle requests. We wouldn't be certain if it comes from one person or lots of different people, in order to go the route that Senator Brophy suggested earlier about putting a limit on the number of requests that can be made. That's the one wrinkle.

Senator Brophy said while the final authority to act on any matter before the legislature is in the hands of the legislature and the committees of the legislature, oftentimes the necessity to act is brought to us by staff. What would then naturally happen is staff would bring to the Chair the notion that it might be time to put a limit on the number of requests that individual members can make. Just like we do with bills, our bills are still confidential but staff has the gatekeeping authority, authorized by our own adopted rules, to say a member has already requested five bills and you're no longer allowed to request these.

Senator Steadman said I think that's a workable understanding and I think it's important that we have this discussion for staff to hear. I do trust their exercise of discretion and how they administer their services for the 100 of us. Are there other points in the draft proposal that anybody has any comments or suggestions about? Have we given staff enough guidance?

12:07 p.m. – Dan Cartin, Director, Office of Legislative Legal Services, testified before the Committee. He said just one clarification on the Chair's discretion over the agenda when our Office finds an issue versus when it doesn't find an issue. It seems fairly clear that if we don't find an issue it's the Chair's discretion, notwithstanding the demands of the legislator who asked for the review, to deny that item on the agenda. Is that correct?

Senator Steadman said that was the intent.

Mr. Cartin said and then when we do find an issue, right now the draft policy says place the issue on the agenda for the next meeting of the Committee. Is that the direction of the Committee?

Senator Steadman said my understanding is that has always been the practice of how our agenda is built. When staff finds an issue and staff has a recommendation they put it on the agenda and it's not really something the Chair has been asked to consent to or approve. I think that's appropriate because the rule review process is a legal inquiry and when we have an opinion from our in-house counsel that there is an issue we need to look at. I personally cannot imagine a situation as Chair where I would deny the opportunity for something to be heard by this Committee when staff believes they have a recommendation that warrants our attention. However, I think I also understand the sentiment and the import of what Senator

Brophy was saying and agree with him in terms of preserving the power of committee chairs and the power of the General Assembly to decide how to conduct its business.

Representative McCann said so if the Office says there's no issue with the rule, this draft policy says they'll take no further action unless the requesting legislator or a member of the Committee asks the Chair to place the rule on the agenda. Is it at that point that the Chair can decide and say even though a member of this Committee has asked that it be put on the agenda, we're not going to put it on the agenda?

Ms. Haskins said I think the language implies that the Chair has the authority to exercise discretion. It would seem to me that, given your discussion, we might want to make that more clear that it's at the discretion of the Chair whether this is placed on the agenda.

Senator Steadman said on this point I want to go back to my preliminary comment that there is a tension between having things presented and debated and decided by this Committee and having surprises in terms of floor amendments. I think if you've got a situation where a member has requested a rule be reviewed and wants it on the agenda and the Chair is blocking it, the Chair should know full well that they're going to invite an ambush on the floor. I don't think you're going to see a lot of willful subverting of the process. I think it's going to work the way it's supposed to work.

Ms. Haskins said I'm not sure we got an answer to Mr. Cartin's question about if we find an issue, does staff schedule it just like any regular rule review issue or does the Chair have discretion?

Senator Steadman said my sense is that if staff has an issue then staff brings it to this Committee and it goes on the agenda. That's the way we've operated to date.

12:12 p.m. – Senator Steadman addressed agenda item 6 - Briefing on pending lawsuits with attorneys for the General Assembly.

Senator Steadman said for the record, this executive session is planned in accordance with section 24-6-402 (3) (a) (II), Colorado Revised Statutes, and we will be discussing attorney-client privilege matters with legal counsel, including counsel from the Office of Legislative Legal Services and outside counsel that has been retained in these matters. It requires a 2/3rds vote of the Committee to approve a motion to conduct an executive session.

12:12 p.m.

Senator Roberts moved that the Committee go into executive session. The motion passed on a vote of 10-0, with Senator Brophy, Representative Foote, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, Senator Roberts, Representative Scott, Representative Waller, and Senator Steadman voting yes.

The tape system was turned off, and the Committee went into executive session. The Committee heard testimony from the following people: Dan Cartin, Director, Office of Legislative Legal Services; Jason Gelender, Senior Attorney, Office of Legislative Legal Services, and Ed Ramey, Attorney from Heizer Paul; Bart Miller, Assistant Director, Office of Legislative Legal Services, and Diego Hunt, Attorney from Holland and Hart; and Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, and Jonathan Bender, Attorney from Holland and Hart.

1:20 p.m.

The Committee returned from executive session and the usual tape system was turned back on.

Senator Guzman moved that the settlement agreement reached in the matter of *Benefield v. Colorado Republican Party* be paid from moneys in the Legislative Expenses Cash Fund created in section 2-3-1002 of the Colorado Revised Statutes. The motion passed on a vote of 9-0, with Senator Brophy, Representative Foote, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, Representative Scott, Representative Waller, and Senator Steadman voting yes.

1:22 p.m.

The Committee adjourned.